BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER SANDERS	)	
Claimant	)	
	)	
VS.	)	
	)	
JOSTENS, INC.	)	
Respondent	)	Docket No. 1,065,540
	)	
AND	)	
	)	
TRAVELERS	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 23, 2013, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. John J. Bryan of Topeka, Kansas, appeared for claimant. Vincent Burnett of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant entitled to medical treatment with Dr. Satterlee until further order or until certified as having reached maximum medical improvement. The ALJ determined the opinions of Drs. Satterlee and Vosburgh held more weight than those of the neutral court-ordered physician, Dr. Prostic.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 5, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ exceeded his jurisdiction by disregarding the neutral, court-ordered, independent medical opinion. Morever, respondent contends the greater weight of the evidence indicates claimant is at maximum medical improvement and does not require additional treatment.

Claimant argues the Board does not have jurisdiction to review this appeal as the issues raised are not compensability issues under K.S.A. 2011 Supp. 44-534a(a)(2). Further, claimant maintains the ALJ did not exceed his jurisdiction in determining which medical opinions to consider under K.S.A. 2011 Supp. 44-551(i)(1).

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent's appeal?

2. Did the ALJ exceed his jurisdiction in disregarding the opinions of the court-ordered physician and ordering additional medical treatment for claimant?

FINDINGS OF FACT

Claimant has been employed by respondent as a press operator since 1973. On June 21, 2012, claimant felt a pop in his left shoulder when pushing a skid into a press. Claimant testified he continued to work for approximately two hours before he informed his supervisor of the pain.

Respondent referred claimant to Dr. Dale Garrett, a physician at Stormont-Vail WorkCare. Dr. Garrett initially ordered an x-ray of claimant's left shoulder on June 22, 2012, which returned as normal. Claimant had several appointments related to his ongoing, continuous shoulder pain. Claimant was prescribed medication and limited duty. Respondent could not accommodate his restrictions, and claimant stopped working. Claimant testified he tried to return to work after a couple of weeks, as he began to feel better. However, claimant's arm continued to bother him, so he notified his supervisor. Respondent sent him back to Dr. Garrett, who ordered an MRI on August 9, 2012. The MRI of claimant's left shoulder revealed a suspected labral tear. Dr. Garrett referred claimant for surgical consultation.

Claimant met with Dr. Erich J. Lingenfelter on September 21, 2012, for an evaluation of his left shoulder. Dr. Lingenfelter recommended claimant undergo an MRI arthrogram due to the poor quality of the original MRI. This latest MRI revealed a rotator cuff tear and impingement syndrome of the left shoulder. Claimant underwent left shoulder arthroscopy with rotator cuff repair and subacromial decompression surgery with Dr. Lingenfelter on November 19, 2012. Following surgery, claimant treated with medication, multiple physical therapy appointments, and several follow-up visits with Dr. Lingenfelter. Claimant testified after surgery he suffered a bout of dizziness upon standing and fell, landing on his left shoulder. He stated he informed Dr. Lingenfelter of the fall.

On March 15, 2013, Dr. Lingenfelter noted claimant was progressing well. He indicated claimant was "a little bit dramatic at times in his pain presentation, but he [was]

definitely better."[1] Dr. Lingenfelter opined claimant would be a maximum medical improvement in three to four weeks after additional focus strengthening, and on April 19, 2013, he determined claimant was at maximum medical improvement. Dr. Lingenfelter noted claimant "has done remarkably well."[2] However, claimant testified that although Dr. Lingenfelter released him, he continued to have problems with his left arm and was not improved:

> Q. So what did [Dr. Lingenfelter] tell you the day he released you?
> A. He told me that workman's comp wants me off, and he has to let me go.
> Q. He didn't say you're as good as you're going to get; he told you that work comp told him that he needed to release you?
> A. Yeah, had to release me.[3]

Claimant referred himself to Tallgrass Orthopedic & Sports Medicine in May 2013 because he continued to have limited movement of his left arm. Leon W. Herring, PA-C, and Dr. Craig L. Vosburgh examined claimant. X-rays were ordered and returned normal. Dr. Vosburgh diagnosed claimant with symptomatic adhesive capsulitis of the left shoulder and recommended claimant receive a new MRI with contrast pending authorization.

Claimant's counsel referred him to Dr. C. Craig Satterlee on July 11, 2013. Claimant presented with pain and decreased motion of the left shoulder. Dr. Satterlee performed a physical examination of claimant and determined he had signs and symptoms consistent with adhesive capsulitis. Dr. Satterlee agreed with Dr. Vosburgh's recommendation for a new left shoulder MRI arthrogram. Additionally, Dr. Satterlee advised that claimant be treated with physical therapy, cortisone injections, or surgery for manipulation and arthroscopic release of the shoulder.

Dr. Edward J. Prostic, a board certified orthopedic surgeon, was appointed by the Court on September 5, 2013, to perform an independent medical evaluation. Dr. Prostic examined claimant on October 14, 2013. Claimant presented with left shoulder pain and difficulty reaching above shoulder level. Claimant indicated to Dr. Prostic he was unable to sleep on his left side and continued to have clicking, popping, and weakness of the left shoulder. After reviewing claimant's medical records and performing a physical examination, Dr. Prostic recommended claimant continue with conservative treatment in

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[1] P.H. Trans., Resp. Ex. B at 6.

[2] *Id*. at 3.

[3] P.H. Trans. at 9.

the form of stretching and strengthening exercises. In accordance with the AMA *Guides,*[4] Dr. Prostic noted in his report:

> Permanent partial impairment is rated at 20% of the left upper extremity. The work-related trauma sustained at [respondent] is the prevailing factor in the injury, the medical condition, and the need for medical treatment, resulting disability or impairments.[5]

Claimant testified he continues to perform home exercises once or twice a week, but the motion of his shoulder is "about the same" as it was prior to physical therapy.[6] Claimant stated he owns an FXD Glide Harley Davidson motorcycle and continues to ride it, but rides less often now due to soreness in his arm. Claimant explained that when he raises his shoulder beyond a certain point, it feels as if it "gets in a bind and starts popping."[7] He denied any problem with his left shoulder prior to his June 21, 2012 accident.[8]

Additionally, claimant testified he is diabetic as of February 2013. Claimant has no family history of diabetes. He claimed his doctor, Dr. Schroeder, related his diabetes to inactivity following surgery.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(f) states in part:

> (1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] Prostic Medical Report (Oct. 14, 2013) at 2-3.

[6] P.H. Trans. at 13.

[7] *Id*. at 17.

[8] Prior to this claim, claimant entered into an Agreed Award with respondent in 2005 for a separate injury sustained on January 15, 2003. In said Award, the parties stipulated claimant's accidental injury resulted in a permanent functional impairment of 18 percent to the body as a whole based upon medical reports submitted by Drs. Phillip D. Hylton and Steven Smith. In his report and using the AMA *Guides*, Dr. Smith assigned claimant a five percent impairment to the left upper extremity for work-related chronic shoulder pain, which corresponds to a three percent impairment to the body as a whole.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-534a(a)(2) states:

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. **A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be**

> **considered jurisdictional, and subject to review by the board.** Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. [Emphasis added.]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2012 Supp. 44-555c(k).

order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[11]

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2011 Supp. 44-551(i)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein.

Respondent argues that the ALJ is somehow bound by the opinions of the court-ordered examining physician. Respondent cites K.S.A. 2011 Supp. 44-516(a), which states:

> (a) In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Nothing in K.S.A. 2011 Supp. 44-516(a) suggests that an ALJ is bound by the findings of a court-ordered physician. The statute only requires the ALJ to consider the opinion. In his Order, ALJ Avery states that he reviewed Dr. Prostic's report. In weighing Dr. Prostic's recommendations for conservative treatment, which consisted of stretching exercises, against the opinions of Drs. Satterlee and Vosburgh, the ALJ chose to order the more aggressive treatment recommended by Dr. Satterlee. The ALJ considered Dr. Prostic's opinions.

The issue whether a worker is entitled to medical treatment is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.[12] The ALJ has the authority to be wrong on that issue.[13] "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power

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[11] See K.S.A. 44-551.

[12] K.S.A. 2011 Supp 44-534a(a)(2).

[13] *Dale v. Hawker Beechcraft Acquisition Co., LLC*, Nos. 1,060,057 & 1,051,048, 2012 WL 3279495 (Kan. WCAB July 18, 2012).

to decide a case rightly, but includes the power to decide it wrongly."[14] This Board member finds that the ALJ has jurisdiction to determine if medical treatment is necessary for a compensable injury. Therefore, this issue is not one of which the Board takes jurisdiction in an appeal of a preliminary order.

CONCLUSION

The Board does not have jurisdiction to review the ALJ's order for medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that respondent's appeal is dismissed for lack of jurisdiction. The Order of Administrative Law Judge Brad E. Avery dated October 23, 2013, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[14] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977), citing *In re Estate of Johnson,* 180 Kan. 740, 308 P.2d 100; *Fincher v. Fincher*, 182 Kan. 724, 324 P.2d 159; *McFadden v. McFadden*, 187 Kan. 398, 357 P.2d 751.